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No. 165

In the Supreme Court of the United States

October Term, 1958

WYMAN HULAN PARR, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Rule and statutes involved	2
Statement	4
Argument	7
Conclusion	10

CITATIONS

Cases:

Brinegar v. *United States*, 338 U.S. 160	7
Evans v. *United States*, 242 F. 2d 534, certiorari denied 353 U.S. 976	8
Giordenello v. *United States*, decided June 30, 1958, No. 549, O.T. 1957	7
Grau v. *United States*, 287 U.S. 124	8
Hardwig v. *United States*, 23 F. 2d 922	8
Lovette v. *United States*, 230 F. 2d 263	8
McNeil v. *United States*, 85 F. 2d 698	10
Nordelli v. *United States*, 24 F. 2d 665	8
Roth v. *United States*, 354 U.S. 476	9
Shelton v. *United States*, 169 F. 2d 665, certiorari denied, 335 U.S. 834	9
State v. *Boyer*, 342 Mo. 64	9
United States v. *Tolomeo*, 52 F. Supp. 737	8
Washington v. *United States*, 202 F. 2d 214, certiorari denied, 345 U.S. 956	8

Statutes and rule:

18 U.S.C. 3052	3, 8
18 U.S.C. 3105	4, 8
18 U.S.C. 3107	4, 8
Rule 41, F.R. Crim. P.	2-3, 8, 9

Miscellaneous:

IX Wigmore, *Evidence* (3d ed.), Section 2591	9

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 29-42) is reported at 255 F. 2d 86.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 27) was rendered May 12, 1958. A petition for rehearing was denied June 11, 1958 (R. 444). The petition for a writ of certiorari was filed July 10, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a valid search under a valid search warrant.

2. Whether, in a prosecution for conspiracy to transport obscene material, it was proper to permit the jury to view some of the transported material in the face of defense willingness to stipulate that the material was obscene.

3. Whether, on a conspiracy charge, the court erred in charging the jury on the law of aider and abettor.

RULE AND STATUTES INVOLVED

Rule 41 of the Federal Rules of Criminal Procedure, as amended, is in part as follows:

* * * *

(c) Issuance and contents.

A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time.

It shall designate the district judge or the commissioner to whom it shall be returned.

* * * *

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * *

Section 3052 of Title 18, U.S. Code is as follows:

Powers of Federal Bureau of Invesigation.

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and

agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Section 3105 of Title 18, U.S. Code is as follows:

Persons authorized to serve search warrant.

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

Section 3107 of Title 18, U.S. Code is as follows:

Service of warrants and seizures by Federal Bureau of Investigation.

The Director, Associate Director, Assistant to the Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to make seizures under warrant for violation of the laws of the United States.

STATEMENT

Petitioner, Wyman Hulan Parr, was indicted by a Grand Jury on two counts of conspiracy to transport and sell obscene and lewd films in interstate com-

merce.[1] Count I charged a conspiracy with George R. Bly, and Count II with Samuel Gold[2] (R. 4-8). Petitioner was convicted by a jury on both counts and was sentenced to consecutive terms of four years imprisonment on Count I and 3 years on Count II (R. 398, 401-402). On appeal, his conviction was unanimously affirmed. (Pet. App. 29-42).

The pertinent facts adduced at the trial are as follows:

Petitioner was admittedly a dealer in obscene films. He started about 1947 or 1948, although he testified he got out of the business in October, 1954 (R. 341-343). His co-defendant, Bly, testified to their joint venture in making obscene films in December of 1955[3] and their arrangement for sale and division of proceeds (R. 67, 70, 72-77, 81). Petitioner's co-conspirator, Gold, testified to the arrangements with Parr for sales of obscene films (R. 159-166). This testimony by accomplices was corroborated by a cameraman, location owners, and purchasers (R. 131-147, 199-205, 210-211, 213-216, 227-228). The obscene films were traced in interstate commerce and identified by purchasers and numerous F.B.I. agents as well as identified as originating from the master

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[1] This was a 5 count indictment. Counts III, IV, and V are substantive counts charging illegal transportation of obscene films by co-conspirator George R. Bly (R. 9-10).

[2] Gold was not named as a defendant here, but was indicted in St. Louis, Missouri, for illegal interstate transportation of these obscene films (R. 168).

[3] Parr paid the actors and his cameras were used (R. 81, 135, 137).

negatives by an F.B.I. film expert (R. 230-233, 234-236, 238-247).

The master negatives were obtained under a search warrant executed by a Special Agent of the F.B.I. (Govt. Ex. 1; R. 180-190). The search warrant was issued upon the voluntary admissions of petitioner's co-defendant Bly (R. 126, 181). The premises searched were jointly owned by petitioner and James Ray Williams and were subject to a written lease to co-defendant Bly (R. 266-273, 79). The record legal title was in Williams alone (R. 78). Bly testified that part of the evidence seized belonged to Parr and part was jointly owned (R. 88-89). Parr testified he got out of the business in October 1954 and specifically denied ownership of the negatives (R. 326-327).

Petitioner made no motion to suppress before trial. When the exhibits were offered in evidence, petitioner objected to their admission (R. 259). The court overruled the objection (R. 259).

In a unanimous opinion, the court below found that petitioner had neither possession nor right to possession of the seized evidence and therefore had no standing to challenge the search and seizure. The court, therefore, did not consider whether the search was valid or whether petitioner was justified in failing to file a pre-trial motion to suppress (Pet. App. 31-32).

After the obscene films were offered and received into evidence, the government sought to show one film in its entirety and portions of two others (R. 259-260). Petitioner's counsel objected, stating in part:

> * * ** it is not a matter of defense that these films are not lewd and obscene, and we are willing to stipulate for the purpose of the record, and we submit that the showing of the pictures, in view of this stipulation, can be nothing more than to prejudice the jury * * *. [R. 260]

The court overruled the objection and permitted the showing (R. 261).

The court below held that the proffered evidence was the gist of the charge and the government was not required to accept a judicial admission, but could prove the essential fact (Pet. App. 30).

ARGUMENT

1. Petitioner complains of a search based upon a warrant predicated upon the admissions of Bly, the lessee of the premises, to the effect that the obscene negatives were located on the leased premises and were the source of the obscene films sold in interstate commerce. After obtaining the warrant, the F.B.I. served it upon the record title holder, James Ray Williams. Hence, regardless of any issue of petitioner's standing, there is no basis for his contention that the evidence was inadmissible.

There was ample probable cause for the warrant based on the admissions of Bly. The fact that the F.B.I. agent, rather than Bly, made the affidavit does not render the warrant invalid since the agent disclosed the sources of his information and the grounds for his belief.[1] See *Brinegar* v. *United States*, 338

[1] The absence of an indication of the sources of information was one of the bases on which the Court found the warrant of arrest invalid in *Giordenello* v. *United States*, decided June 30, 1958, No. 549, O.T. 1957.

U.S. 160, 174-176, particularly fns. 13 and 15 in which the Court indicated rejection of its earlier dictum of *Grau* v. *United States*, 287 U.S. 124, 128. See also, to the effect that a search warrant may be based on reliable information, *Washington* v. *United States*, 202 F. 2d 214 (C.A. D.C.), certiorari denied, 345 U.S. 956.

As to petitioner's argument that an F.B.I. agent is not a peace officer, it is sufficient to indicate that 18 U.S.C. 3105 and 3107 provide explicit authority for the F.B.I. to procure, serve and execute search warrants. *United States* v. *Tolomeo*, 52 F. Supp. 737 (W.D. Pa.). See also 18 U.S.C. 3052 and Rule 41(g), Federal Rules of Criminal Procedure. Petitioner's other objection is that the return as made is not dated. However, this is a ministerial act and does not void the return. *Evans* v. *United States*, 242 F. 2d 534 (C.A. 6), certiorari denied, 353 U.S. 976; *Nordelli* v. *United States*, 24 F. 2d 665 (C.A. 9).

Moreover, as the court below held, the petitioner had no standing to object to the evidence. He did not have record title to the premises and, in addition, Bly held the property under lease, although it is claimed the lease was in default. *Hardwig* v. *United States*, 23 F. 2d 922 (C.A. 6). The petitioner at no time, prior to, during, or subsequent to the trial, has ever claimed any interest in the personalty seized, except as derivative of a lien for rent based upon a secret partial ownership of the realty. The lower court therefore concluded that petitioner did not have sufficient interest in the premises or the property to be in a position to challenge the search and seizure. *Lovette* v. *United States*, 230 F. 2d 263 (C.A. 5).

Furthermore, Rule 41(e) of the Federal Rules of Criminal Procedure specifically states that a motion to suppress shall be made before trial unless the defendant was not aware of the grounds. Here the government, at petitioner's behest, had supplied a bill of particulars to the indictment detailing the films transported and also a bill of particulars outlining the names of the negatives and stating all but two had been furnished by defendant Parr (R. 23-29, 393-396). If Parr claimed that these negatives had been illegally seized from him, that was the time to move for their suppression, not after they were offered in evidence.

2. Petitioner argues that, in view of his willingness to stipulate that the film were obscene, it was prejudicial to permit the jury to see any of them. Petitioner no longer argues, as he did below, that they were insufficiently identified, nor does he deny they constitute an element of the crime charged. Of course, in every obscene case the pictures are directly admissible as they constitute an element of the crime, and there seems to be no difference whether they are seen immediately upon being admitted or later in the jury room where, of course, there is no opportunity for objection. The obscenity is ultimately for the jury to decide. *Roth* v. *United States*, 354 U.S. 476. In view of the jury's duty to weigh the evidence, the government was not bound to rest solely on petitioner's admission, but was entitled to prove its case. *Shelton* v. *United States*, 169 F. 2d 665, certiorari denied, 335 U.S. 834; *State* v. *Boyer*, 342 Mo. 64; IX Wigmore, *Evidence* (3d ed.), Section 2591.

3. During the course of the charge to the jury the trial court gave an instruction (to which petitioner objected) upon the federal law which considers an aider and abettor as a principal (R. 378, 382). The trial court commented, "I am half inclined to agree with you but since we are to charge on accomplices they will better understand the one if the other is given" (R. 382). As the court below noted "This was introductory to the Court's instruction stating that an aider or abettor was an accomplice and outlining the care with which accomplice testimony should be weighed" (Pet. App. 32). If anything, this was an attempt by the trial judge to restrict accomplice testimony; it could only inure to petitioner's benefit. In any event, viewing the charge as a whole and in context, the jury was fully instructed and there was no harmful error. See *McNeil* v. *United States*, 85 F. 2d 698 (C.A. D.C.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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